PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

FILED October 26, 2006

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **MARK ROBERT MOORE,** A Member of the State Bar.	**05-PM-01175** **OPINION ON REVIEW**

BY THE COURT[1]

Upon finding that respondent, Mark R. Moore, violated the terms of his disciplinary probation by submitting five required probation reports late, by not submitting a report due January 10, 2005, and by not providing proof that he had made required restitution of $3,541.70, plus interest, a State Bar Court hearing judge recommended revocation of probation and imposition of a two-year suspension, the execution of which was previously stayed. Respondent did not participate in this proceeding until after the hearing judge issued his decision. At that point, respondent unsuccessfully sought reconsideration, claiming, inter alia, that he was financially unable to make restitution or pay the required costs of his first disciplinary proceeding, that he had moved to a village in Vermont and planned to apply for admission to practice law in Vermont, but was reluctant to do so because of the current proceeding.

[1]Before Stovitz, P.J., Watai, J. and Epstein, J.

After the hearing judge denied respondent's request for reconsideration, he sought review before us, essentially claiming that he did not defend the proceedings because of fear that costs would be assessed, that the hearing judge erroneously denied reconsideration, and that, in recommending revocation of probation, the judge considered "dramatically different facts and circumstances" than exist.[2]

As this is a plenary review under rule 301 of the Rules of Procedure of the State Bar, we have reviewed the record independently. (*In re Morse* (1995) 11 Cal.4th 184, 207, Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a).) As a result, we have concluded that, with an insignificant correction to the hearing judge's conclusions, the judge's decision to revoke probation is amply supported by the evidence. Respondent neither established a sufficient excuse for failure to timely defend these proceedings against him, nor did he establish good cause to seek reconsideration from the adverse decision against him. Respondent has essentially been in violation of conditions of probation for a four-year period. Moreover, a prior disciplinary proceeding in 2003, arising from his earlier violations of probation in the same matter, was ineffective in obtaining his compliance.

Background and Findings

The current proceeding was started on March 10, 2005, by the State Bar's filing of a motion to revoke probation. Respondent did not reply, and, as the State Bar had not requested a hearing, on April 18, 2005, the hearing judge submitted the matter without a hearing. Pursuant to rule 563(b)(3) of the Rules of Procedure of the State Bar, respondent's failure to reply constituted

[2]In his Motion for Reconsideration and before us, respondent has set forth at length contentions concerning the civil dispute for which he was retained in the underlying proceeding. We fail to see the relevancy of those many facts to the issue before us: whether the hearing judge's decision to revoke probation is supported by a preponderance of the evidence. (See Rules Proc. of State Bar, rule 561.)

an admission of the factual allegations of the State Bar's motion to revoke probation and supporting documents. The hearing judge's findings show that respondent was admitted to practice law in 1977, and has been suspended twice. He was suspended by the Supreme Court, effective August 2001, and was placed on probation by an eighteen-month stayed suspension, on conditions including a 30-day actual suspension, the filing of required probation reports, and the making of restitution of $5,000 to Thomas Pyne. As to that probation, respondent failed to make 12 required restitution payments due Pyne and failed to either timely file required probation reports, file complete reports or file them at all. As a result, effective August 2003, the Supreme Court imposed on respondent an additional suspension of 60 days' actual, as part of a two-year stayed suspension. This 2003 suspension required restitution to Pyne of $3,541.70, plus interest, and the filing of mandatory quarterly reports.

In the current proceeding, the hearing judge found that respondent failed to file a required probation report due January 10, 2005, filed five reports untimely and failed to prove that he made timely restitution to Pyne by the August 2004 deadline. The hearing judge concluded that respondent willfully violated his probation terms.[3] In aggravation, the hearing judge noted respondent's prior record, involving the same misconduct as in the present matter. Also, the judge noted that respondent's misconduct harmed the administration of justice since it burdened the State Bar probation system, and his failure to comply after reminders to do so by the State Bar's Office of Probation demonstrated indifference to rectify or atone for the consequences of his misconduct. No mitigation was found. The hearing judge recommended that respondent's probation be revoked.

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[3]We treat as a simple and insignificant error the hearing judge's conclusion that respondent failed to submit his October 2004 report. As the hearing judge's detailed findings show, respondent had submitted his October 2004 report tardily but had not submitted his report due January 2005.

After the hearing judge filed his decision, respondent sought reconsideration as noted *ante*. The State Bar opposed this effort and the hearing judge denied it. Respondent then sought our review. Both parties waived oral argument before us.

Discussion

Respondent's claims on review are essentially a repetition of his motion filed below seeking reconsideration. They are unmeritorious. First, to the extent that respondent seeks to litigate before us the underlying facts of his first disciplinary proceeding, he cannot do so, as he stipulated to his culpability and the decision establishing it has long since become final. (Cf. *In re Kirschke* (1976) 16 Cal.3d 902, 904 [conviction referral proceeding].) Second, respondent has never shown any facts excusing his failure to defend the instant probation proceeding. Indeed, the only conclusion that we can draw from the record is that respondent intentionally decided not to participate in his defense for fear of a costs assessment against him if he were unsuccessful. (Bus. & Prof. Code, § 6086.10.) The State Bar served respondent with process in this matter at his Vermont address and respondent does not establish otherwise. It was respondent's decision not to defend this action when afforded the chance to do so and he cannot now seek a belated opportunity to participate. We adopt the hearing judge's findings of fact; and, except as noted *ante*, his conclusion.

It is well established that an accused attorney may not decline to present evidence in State Bar proceedings when given an opportunity to do so and then demand on reconsideration or review that his evidence be considered for the first time. (*Barreiro v. State Bar* (1970) 2 Cal.3d 912, 925.) Moreover, even if, arguendo, we were to consider belatedly respondent's claims of financial pressures, they cannot serve to excuse his failure to make restitution to Pyne, four years after he stipulated that he would do so.

As we have observed, the extent of discipline to impose in a probation violation matter depends in part on the seriousness of the violation as well as on respondent's recognition of his misconduct and his efforts to comply with probation. Greater discipline is warranted for probation breaches significantly related to the misconduct for which probation was ordered. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.) In that regard, respondent's failure to make restitution is an especially serious breach as is his protracted failure to file reports timely or, in some cases, at all. (E.g., *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 151.)

Especially of concern is that respondent's second discipline was imposed for his failure to comply with conditions in the same matter as is now before us. Yet, this discipline did not serve to impress on respondent the importance of compliance or to provide sufficient incentive for him to do so. Accordingly, we agree with the hearing judge that respondent's probation should be revoked in full and that the entire stayed suspension should be imposed as the appropriate discipline in this case.

We therefore recommend to the Supreme Court that the probation of respondent, Mark Robert Moore, imposed in Supreme Court case no. S116088, be revoked, that the previous stay of execution of suspension be lifted, that respondent be actually suspended for two years and that suspension should continue until respondent establishes his proof of fitness, rehabilitation and learning and ability in the law, pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.[4]

We further recommend that respondent be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in paragraphs (a) and (c) of that rule

[4] The standards are found in title IV of the Rules of Procedure of the State Bar of California.

within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.